of Case Stated) and the view taken in their conclusion on the applicability of para. 28. The genesis of this paragraph is section 22(5) of the British Finance Act 1965 which was subsequently reproduced in section 46 of the British Capital Gains Tax Act 1979. The Commissioners agreed with the learned authors of Patrick Soares "Trusts and Tax Planning," (1979 edition) K.R. Tingley "Key to Capital Gains Tax (Finance Act 1981)" and Butterworth's U.K. Tax Guide, 1982-83 that the word "trustee" in the said paragraph means "bare trustee." Was the respondent acting as a bare trustee at the time when the properties of the estate devolved on him as executor under para. 3(a) of Schedule 2? "A bare trustee is a person who holds property in trust for the absolute benefit and at the absolute disposal of other persons who are of full age and *sui juris* in respect of it, and who has himself no present beneficial interest in it and no duties to perform in respect of it except to convey or transfer it to persons entitled to hold it, and he is bound to convey or transfer the property accordingly when required to do so." *Halsbury's* Law of England 4th edn. Vol. 48 para. 641).

In fact, in *Parker and Mellows* on Modern Law of Trust, 4th Edition p.17, the learned authors described a bare trust as a simple trust where a trustee is simply a repository of the trust property with no active duties to perform. So if *A* gives the legal estate in property to *B* on trust for *C* absolutely, the trust is a simple trust. The only duty *B* has to perform is to transfer the legal estate in the property to *C* if *C* so directs.

In the Act, the word trustee is not defined. However, under section 3(1) of the Trustee Act 1949, trustee includes a personal representative. Although the respondent under the circumstances is a trustee, but having regard to his beneficial interest and the duties he had to perform or which he had performed to extract the Grant of Letters of Administration it is my finding that he was not a bare trustee. As such, I hold that para. 28 Schedule 2 does not apply in this case.

For the above reasons, I allow the appeal and amend the assessment accordingly. The tax payable shall now be $4,661.60 and the refund due to the respondent shall be $7,327.80.

There is, however, a further dispute between parties regarding interest. On December 26, 1985 when I delivered the judgment I requested both counsel to furnish written submissions on this issue. It is clear that the Real Property Gains Tax Act 1976 does not provide interest (see: section 24 of the Act). In my opinion, even if there is no statutory provision the present case is one of an exercise of judicial discretion. In the words of Lord Wilberforce in *General Tire and Rubber Company* v. *Firestone Tyre Rubber Company Ltd.*[1]:

> "The discretion must be exercised judicially and for reasons which can be stated. Where a wrong-doer had failed to pay money which he should have paid, justice, in principle, requires that he should pay interest over the period for which he has withhold the money."

In the present case, has the defendant been deprived of his money being the balance of the tax chargeable at the time of the appeal? My short answer is "No" because until the outcome of this appeal, the Revenue was entitled to the full amount which they had assessed. As such there was no deprivation of the sum of money belonging to the respondent. It is plain that until the outcome of the appeal the Revenue cannot be said to withhold the said balance unnecessarily or has acted unreasonably in the circumstances. In my judgment the respondent is not entitled to claim interest on the balance of $7,327.80. Therefore, in accordance with section 24(6) of the Act the Director General shall cause repayment of the aforesaid sum to be made forthwith.

I make no order as to costs.

Appeal allowed.

Solicitors: *Shan & Gooi.*

TUN DATU HAJI MUSTAPHA BIN DATU HARUN v. LEGISLATIVE ASSEMBLY OF STATE OF SABAH & ORS.

[O.C.J. (Abu Mansor J.) June 14, 1985]

[Kota Kinabalu – Civil Suit No. K482 of 1985]

Constitutional Law – Legislative Assembly – Injunction to restrain sitting – Jurisdiction – No merits in application – Sabah Constitution, arts. 13, 21 & 25 – Federal Constitution, art. 72(1).

In this case the plaintiff applied for an interlocutory injunction to restrain the Legislative Assembly of Sabah from sitting because he claimed the Yang di-Pertua Negeri had exercised his powers of summoning the sitting follow-

ing the advice of a person or cabinet which the plaintiff said had not been validly appointed and that at that sitting the defendants will carry out acts which they are not legally authorised to do.

Held: the court had no jurisdiction to grant the injunction and moreover there were no merits in the application. The court in the exercise of its discretion would refuse the application.

Cases referred to:

(1) *McDonald* v. *Cain* [1963] V.L.R. 411.
(2) *Fan Yew Teng* v. *Government of Malaysia* [1976] 2 M.L.J. 262, 264.
(3) *R.* v. *Sir R.F. Graham-Campbell, ex parte Herbet* [1935] 1 K.B. 594.

EX PARTE SUMMONS-IN-CHAMBERS.

Abdul Razak Rouse for the applicant.

Abu Mansor J.: By *ex parte* Summons-in-Chambers dated May 27, 1985, the plaintiff applied for an interlocutory injunction to restrain the 1st defendant (Sabah State Assembly) from sitting until the determination of Kota Kinabalu High Court Civil Suit No. K.467 of 1985 (the 1st Suit), 2nd defendant (Speaker) from conducting, permitting or causing to be permitted or continuing a sitting or any proceedings of the 1st defendant until after the trial of the 1st Suit and 3rd defendant (Deputy Speaker) from conducting, permitting or causing to be permitted or continuing a sitting or any proceedings of the 1st defendant or carrying out the duties or performing the functions of the 2nd defendant similarly until after the trial of the said 1st Suit. I dismissed the plaintiff's application against the defendants and I now give my reasons.

In support of the plaintiff's application for the interlocutory injunction the plaintiff swore an affidavit stating that apart from this Civil Suit No. K482 of 1985 (the 2nd Suit) filed on the May 27, 1985 under which this present injunction was being applied for the plaintiff had also filed in Kota Kinabalu High Court on May 22,1985 the 1st Suit naming the Yang di-Pertua Negeri of Sabah, 1st defendant, and Datuk Joseph Pairin Kitingan, 2nd defendant, praying for declarations the gist of which is the 2nd defendant in that suit is not the lawful Chief Minister and ought not to act as such and exercise powers conferred by the Constitution. The plaintiff further stated that on May 15, 1985 the 1st defendant herein commenced its first sitting after it was summoned by the Yang di-Pertua Negeri in exercise of his powers under the Constitution the exercise of which the plaintiff alleged the Yang di-Pertua Negeri is required to act in accordance with the advice of a lawfully appointed Cabinet or a member thereof. The plaintiff also further alleged that if he is successful in the 1st Suit and relief is granted therein this will render, so the plaintiff alleges, the summoning of the 1st defendant herein as aforesaid and all subsequent adjournments nullities. The plaintiff then went on to allege that he had news of 1st defendant's next sitting would be on May 30, 1985 (the sitting) through the Radio Television Malaysia. The plaintiff urged on the Court unless the Court grants the interlocutory injunction sought in this Summons herein the defendants will carry out acts they are not legally entitled to perform or undertake.

The totality of the plaintiff's application is that he wants the Court to issue an interlocutory injunction stopping the sitting because the Yang di-Pertua Negeri has exercised his powers of summoning the sitting following the advice of a person or Cabinet which the plaintiff said had not been validly appointed and that at that sitting the plaintiff says the defendants will carry out acts they are not legally entitled to do. The plaintiff did not specify what those "acts" were.

The first thing that came to mind in considering whether I should grant an interlocutory injunction was that such injunction is a discretionary remedy and like all discretions it must be exercised on judicial principles. Next was since the total effect of granting the injunction was to restrain the Assembly from conducting its sitting, before the Court could proceed to other considerations I was of the view the crucial question that had to be answered first was whether the Court had jurisdiction to grant such injunction. The plaintiff submitted that the Court had and referred the Court to *McDonald* v. *Cain*,[1] where the Court granted an injunction against the Ministers of the Crown and the Members of the State Executive Council of Victoria State and also against the Clerk of Parliament restraining the Clerk from transmitting the disputed Bill to the Governor for his assent before it became law and against the Ministers of the Crown to prevent them from giving the advice to the Governor that the Bill was fit for his signature. This case can be easily distinguished by the fact that the Assembly had sat and finished its business and what was at issue was whether the disputed Bill should have been passed by certain required majority through all its stages in Parliament, whereas in our case what was urged on the Court by the plaintiff was a different matter – stoppage

of the State Assembly Sitting due to take place in two days' time. I therefore rule that that case was of no help to the plaintiff in his present application. The urgent question was can the Court question the validity of the proceedings of the Assembly due to take place and issue an order to stop it? In relation to Sabah, Article 25 of the State Constitution provides that subject to Article 72 of the Federal Constitution the Assembly may regulate its privileges, immunities or powers but they should not exceed those of Federal Parliament. Then Article 72(1) of the Federal Constitution provides that the validity of any proceedings in the Legislative Assembly of any State shall not be questioned in any Court. The parallel of the present application is to be found in the case of *Fan Yew Teng* v. *Government of Malaysia*[2] where the applicant therein applied that the Dewan Rakyat desist from discussing his disqualification as a Member of the House. The learned Judge, Chang Min Tat J., as he then was, quoted with approval *S.A. de Smith* in his "Judicial Review of Administrative Action" (3rd Edition) at page 418 where the learned author has this to say:-

"The courts have no jurisdiction to restrain by injunction, or otherwise to pass upon, any conduct that forms part of proceedings in Parliament, even though the matter in issue is not directly connected with the process of legislation. In the well-known case of *Bradlaugh* v. *Gossett* (1884) 21 Q.B. D. 271, the court refused to award the Plaintiff an injunction against the Serjeant-at-Arms to restrain him from enforcing an order of the House of Commons requiring him to exclude the Plaintiff from the House, or a declaration that the order of the House was void. Assuming that the Plaintiff was right in his contention that the order of the House was based upon the misconstruction of a statute, nevertheless the courts had no jurisdiction to interfere, for the matter fell exclusively within the scope of the privilege of the House to regulate its own internal proceedings.

It is to be noted that the case cited by the plaintiff's counsel – *McDonald* v. *Cain's case* – itself throws some light on the question of jurisdiction where at page 419, Gavan Duffy J., after disagreeing with the learned Solicitor-General's submission therein that the Court had no jurisdiction, remarked:

"There is no doubt that the courts will not interfere with the Council's management of its business within the four walls of Parliament even if it appears that some legal right has been interfered with."

Then again at page 436 therein F.C. O'Bryan J. said:

"The Solicitor-General then relied upon *Bradlaugh v. Gossett* (1884) 21 Q.B.D. 271, and what was said by Lord Coleridge C.J., at pp. 272-3, and by Stephen J., at pp. 276-7. But in that case what was sought by the plaintiff was an order to declare that what had been done in the House itself. . . . . This was held to be an invocation of the courts of law to control the House of Commons in its internal procedure and proceedings – a thing which is plainly outside their jurisdiction. It is ancient and well-established law that what is said and done within the walls of Parliament cannot be inquired into in a court of law."

Further at page 437 of this *McDonald* v. *Cain's case* the same learned Judge referred to *R.* v. *Sir R.F. Graham-Campbell ex parte Herbet*[3] in which an attempt was made to invoke a judicial inquiry in the Court of the King's Bench into the legality of the supply of intoxicating liquor in the House of Commons. The attempt failed because it was an attempt to control the House of Commons in a matter in which it has the privilege of regulating being a matter of its own internal affairs and procedure. No Court of law has jurisdiction to interfere in such matters.

As far as the merits of the plaintiff's case for an interlocutory injunction went, the main thrust of the plaintiff's argument appears to be in paragraphs 2 and 3 of the plaintiff's said affidavit wherein plaintiff referred to his Writ in the 2nd Suit which in turn referred to the 1st Suit that as the plaintiff has claimed therein that the 2nd defendant, Datuk Joseph Pairin Kitingan, is not the lawful Chief Minister and therefore, so the plaintiff alleges, that any summoning of the State Legislative Assembly must be in accordance with the advice of the said Chief Minister or a member thereof. The plaintiff goes on to allege that if the plaintiff is successful in the said suit this will render the summoning of the State Assembly and all subsequent adjourned sitting nullities.

The Court is entitled to take judicial notice of what was already public knowledge that the present Chief Minister having been appointed assumed office. According to the plaintiff's affidavit itself one sitting of the State Assembly was convened on May 15, 1985 after that appointment and he still assumed that office without being voted out. I am of the view, having regard to all these factors, the incumbent is ostensibly the holder of that post.

It has to be said here that we have to start on the premise that the plaintiff by just merely filing the Writ questioning the validity of the Chief Minister's appointment does not make the appointment of the Chief Minister void. At its worst what can be said is it is voidable and until it is so declar-

ed it has to be presumed that the appointment is valid and therefore all acts of the said Chief Minister is to be viewed in that light. Since this is the stand that I take I cannot see how the plaintiff's argument has helped him in his application. That being so, the Court also cannot see how the plaintiff's allegation made in paragraph 6 of his affidavit that the defendants will carry out acts they are not legally entitled to perform or undertake has been made out.

In making the submission that the Chief Minister or Executive or Government of the day does advise the Yang di-Pertua Negeri as to the convening of the State Assembly, we must not lose sight of the fact that the State Assembly is an entity quite separate from and independent of Government and Sovereign. In Article 13 of the Sabah Constitution the Legislative Assembly of the State, like any of the other States, consists of the Yang di-Pertua Negeri and one House. As to summoning it, Article 21(1) provides the Yang di-Pertua Negeri may from time to time summon the Legislative Assembly. Once summoned the doctrine of separation of powers within the framework of a working democracy operates and to see where the Executive or the Government stands *vis-a-vis* the Assembly it is useful to refer to the judgment of Justice Chang Min Tat, as he then was, in the case of *Fan Yew Teng* v. *Government of Malaysia* above at page 266:

"As to the question whether the Government of Malaysia is wrongly cited as the defendant to these proceedings, the contentions of the plaintiff, put in a nutshell, are that the Government is a necessary party because it is interested in his expulsion and anyone who is interested could be cited as a defendant. The latter contention is plainly untenable. The former, when examined, obviously ignores the doctrine of the separation of powers provided in our Constitution and, however Government as distinct from members of the Legislature may be said to be interested, it also ignores the fact that in the final say, it is the House itself which is concerned with and which alone has the powers to determine the question of its membership. The Plaintiff himself must know this to be the whole truth. To be a member of the House does not necessarily mean that the member is part of the Executive or Government. This is true as much for back-benchers as for members of the Opposition. To contend otherwise is to denigrate from the dignity and standing of the House as one arm of the sovereignty of the nation.

This will be readily appreciated when it is realised that one of the most important of the Speaker's functions is to protect the House against the powers and encroachments of the Executive and to protect minorities within the House itself. As Colonel Clifton Brown said on his re-election as Speaker in 1945, 'As Speaker, I am not the Government's man, nor the Opposition's man. I am the House of Commons' man and, I believe, above all, the back-benchers' man.' And so far as membership of the House is concerned, in the words of W.J. Brown as cited by Martin Lindsay in his booklet on the House of Commons, 'The humblest back-bencher is no less than a member and the greatest Minister is no more than a member, in respect of his Parliamentary rights.'

The high water mark of the independence of the House of Commons from the Executive was reached in the reign of Charles I when Speaker Lenthal resisted the attempt of the Monarch to look for and arrest five members of the House of Commons in these classic words: 'May it please Your Majesty, I have neither eyes to see nor tongue to speak in this place, but as this House doth direct me, whose servant I am.' ...."

In the exercise of my discretion whether to grant or refuse an interlocutory injunction I sought to find if there was anything in the plaintiff's application or submission where the plaintiff has satisfied me that I can grant it. On the contrary I find the authorities point one way that I have no such jurisdiction to grant and more coupled by the merits of the application the plaintiff has not shown me why I should grant it. I, therefore, in the exercise of my discretion refused and dismissed the plaintiff's application against the 1st, 2nd and 3rd defendants. As no order was sought in the prayers in the Summons against the 4th defendant I make no order against him.

Application refused and dismissed.

Solicitors: *Rayner & Co.*

TUN DATU HAJI MUSTAPHA BIN DATU HARUN v. TUN DATUK HAJI MOHAMED ADNAN ROBERT, YANG DI-PERTUA NEGERI SABAH & DATUK JOSEPH PAIRIN KITINGAN

[O.C.J. (Abu Mansor J.) November 4, 1985]

[Kota Kinabalu – Civil Suit No. K467 of 1985]

Constitutional Law – Application for injunction against Chief Minister and Yang di-Pertua Negeri – Allegation that Legislative Assembly is being dissolved – Allegation that Speaker is to be removed – No evidence but mere speculation – Injunction cannot be granted against officers of Government – Government Proceedings Act, 1956, s. 29(2) – Sabah Constitution, arts. 7(1), 10(2), 15(1), 18, 19 & 21(2). – Federal Constitution, art. 72(1).

Practice and Procedure – Injunction – Application for – No statement of claim – Appeal – Erinford injunction – R.H.C. 1980, O.29.